

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE
January 28, 2008

D049261 People v. Rodriguez

Rodriguez's conviction for carjacking (Pen. Code, § 215, count 3) and the count 5 conviction for felony false imprisonment (Pen. Code, §§ 236, 237, subd. (a)) are reversed. The superior court is directed to amend the abstract of judgment accordingly and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed. O'Rourke, J.; We Concur: Huffman, Acting P.J., McIntyre, J.

D052066 Kalicki et al. v. Superior Court of San Diego County/Muke et al.

The petition is denied.

D051834 Jones v. Superior Court of San Diego/People

The petition for writ of mandate has been read and considered by Justices Benke, Nares and Aaron. The petition is denied.

D050978 In re Geraldo M., a Juvenile

The order is affirmed. Haller, J.; We Concur: Nares, Acting P.J., O'Rourke, J.

D051129 In re Justin R. et al., Juveniles

The request for publication of the opinion is denied.

D049883 Exarhos v. Exarhos

The court requests that respondent file an answer to appellant's petition for rehearing. The answer must be filed no later than February 5, 2008.

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

January 28, 2008 (Continued)

D051704 In re Muhammad on Habeas Corpus

The petition for writ of habeas corpus filed September 25, 2007, motion to vacate judgment filed October 2, 2007, amended motion to vacate judgment filed November 6, 2007, supplement to petition for writ of habeas corpus filed December 17, 2007, and supplement to amended motion to vacate judgment filed December 17, 2007, are construed together as a single petition for writ of habeas corpus. So construed, the petition for writ of habeas corpus has been read and considered by Justices Benke, Nares and Aaron. We take judicial notice of petitioner's prior habeas petition before this court, No. D049002.

On June 19, 2000, petitioner pleaded guilty to one count of committing a forcible lewd act upon a child under the age of 14, and admitted an allegation that he kidnapped the victim, which substantially increased the risk of harm to the victim. As part of the plea agreement, seven remaining counts were dismissed and the parties stipulated to a sentence of 25 years to life. Petitioner was sentenced accordingly on July 17, 2000. Petitioner did not appeal, having waived that right as part of the plea agreement.

Petitioner filed the instant petition arguing a series of ineffective assistance of counsel claims, and prosecutorial misconduct.

Petitioner acknowledges the petition is untimely, but contends he is unskilled in the matters of law and only recently discovered the claims with the assistance of a fellow inmate. Neither excuse is sufficient to establish good cause for the substantial delay. (*In re Robbins* (1998) 18 Cal.4th 770, 814, fn. 34; *In re Streeter* (1967) 66 Cal.2d 47, 52 [ignorance of the law not sufficient to excuse delay in filing habeas petition]; *In re Barnett* (2003) 31 Cal.4th 466, 475 [no right to counsel on habeas corpus proceedings].)

Petitioner also contends he did not discover the claims until he received his file from the alternate public defender's office on May 7, 2007. Petitioner fails to explain why the file was essential to bring claims about counsel's performance, or the prosecutor's actions, which he knew about at the latest when he was sentenced on July 17, 2000. Petitioner worked with counsel before he pleaded guilty, received charging documents from the prosecutor, and otherwise knew about the actions of both over seven years ago. Moreover, petitioner makes no showing that he requested the file at an earlier date or was somehow impeded from obtaining it. The petition is therefore procedurally barred because it is untimely, and petitioner has not established an exception to the procedural bar. (*In re Robbins, supra*, 18 Cal.4th at p. 814, fn. 34; *In re Clark* (1993) 5 Cal.4th 750, 797-798; *In re Bower* (1985) 38 Cal.3d 865, 873, fn. 3.)

Petitioner also acknowledges the petition is successive, having filed a previous petition in this court, No. D049002. In an attempt to circumvent the procedural bar, petitioner claims he is actually innocent.

A claim of actual innocence requires "newly discovered, irrefutable evidence of innocence of the offense or degree of offense of which the petitioner was convicted." (*In re Clark, supra*, 5 Cal.4th at p. 798, fn. 33.) Petitioner must show this evidence would "undermine the entire prosecution case and point unerringly to innocence or reduced culpability." (*Ibid.*, quoting *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1246.)

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Petitioner contends his claims are "newly discovered" because he just received the file. As discussed above, obtaining counsel's file does not make claims petitioner knew or should have known about over seven years ago "newly discovered." The fact that petitioner waited so long to request the file, and received it in 2007, also does not make his claims "newly discovered." Moreover, petitioner presents no direct actual innocence claim, but rather presents the merits of his ineffective assistance of counsel and prosecutorial misconduct claims, contending each is a "fundamental miscarriage of justice" excusing the successiveness of his petition. Essentially, petitioner attempts to have this court consider the merits of his claims in a second petition by cloaking them as newly discovered, and purporting they establish actual innocence. We decline to entertain such a piecemeal and untimely attack on petitioner's conviction and conclude the petition is procedurally barred because it is successive and untimely, and petitioner has not established the actual innocence or any other exception to the procedural bar. (*In re Clark, supra*, 5 Cal.4th at p. 798, fn. 33.)

The petition is denied.

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FOURTH APPELLATE DISTRICT
DIVISION ONE

January 28, 2008 (Continued)

D051733 In re Scott on Habeas Corpus

The petition for writ of habeas corpus has been read and considered by Justices Benke, Nares and Aaron. We take judicial notice of San Diego County Superior Court file No. SCD191635 and petitioner's direct appeal No. D047613.

A jury found petitioner guilty of one count of selling cocaine (Health & Saf. Code, § 11352, subd. (a))¹ and one count of possession for sale of cocaine (§ 11351), and found true an allegation that the weight of the cocaine exceeded four kilograms (§ 11370.4, subd. (a)(2)). The court sentenced petitioner to nine years: the middle term of four years on the selling cocaine count, with a consecutive five-year enhancement for the related allegation. The court imposed the middle, three-year term on the possession for sale count, but stayed its execution under Penal Code section 654.

Petitioner appealed his conviction and this court affirmed the judgment in No. D047613, on September 6, 2006.

While his appeal was pending, petitioner filed a habeas petition in the trial court on January 12, 2006. This petition was denied because of his pending appellate proceedings.

Petitioner then filed a second habeas petition in the trial court, arguing he did not know about the possession of sale count and trial counsel was ineffective for (1) failing to provide discovery documents to petitioner which would have apprised him of the charge; (2) allowing the possession for sale count to be added "by stealth;" and (3) inaction regarding the special allegation enhancement. On May 9, 2007, the trial court denied the petition because petitioner's entire appeal was based on alleged deficiencies of counsel, but petitioner failed to bring the claims in his appellate proceedings. The trial court also found that, even if the claims were cognizable, the first two claims failed because the original complaint, filed two days after petitioner's arrest, and petitioner's arraignment, included the charges. The third claim failed because counsel did take action by attempting to eliminate the allegation.

On May 23, 2007, petitioner filed a third habeas petition in the trial court, alleging (1) ineffective assistance of trial counsel in that his sentence was improperly enhanced due to counsel's shortcomings, and (2) ineffective assistance of appellate counsel for (a) failing to consult with petitioner on the issues to be raised on appeal, and (b) failing to argue ineffective assistance of trial counsel in that his sentence was improperly enhanced due to counsel's shortcomings. On July 17, 2007, the trial court denied the ineffective assistance of trial counsel claim because it was raised and rejected in petitioner's second habeas petition before the court. The trial court denied the ineffective assistance of appellate counsel claims because petitioner did not provide any supporting documentation that counsel failed to consult with him, and petitioner could have raised the claim in his second habeas petition.

Petitioner has now turned to this court, contending in the instant habeas petition: (1) appellate counsel was ineffective in failing to raise (a) trial counsel's ineffectiveness for allowing the prosecution to introduce wire tap evidence that allegedly was not given to petitioner during discovery, and (b) failing to argue the trial court erred in failing to instruct on a lesser included

¹ Statutory reference are to the Health and Safety Code, unless otherwise specified.

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offense ; (2) trial counsel was ineffective in failing to challenge jury instructions regarding conspiracy because petitioner was never charged with a conspiracy; and (3) trial counsel was ineffective in failing to allow the allegation of possession for sale of cocaine, which did not exist months before trial, and hearsay evidence regarding the allegation, to be "brought in at trial by 'stealth.' "

Petitioner's case has been a continuous, piecemeal attack on trial and appellate counsel. At trial, petitioner alleged inadequacies of counsel in hearings under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), on August 11 and 26, and October 6 and 7, 2005. Those hearings largely centered around allegations that petitioner was not advised by counsel of his rights to a speedy trial, and counsel was negligent in obtaining discovery from the district attorney. The trial court conducted extensive hearings and denied each of petitioner's *Marsden* motions. Petitioner appealed, contending the trial court improperly conducted the *Marsden* hearings, and thus erred in denying the motions. This court reviewed the *Marsden* hearings on appeal and affirmed the judgment in No. D047613. In our opinion, we noted petitioner did not "assert on appeal that he was actually denied his rights to speedy trial or denied his right to effective assistance of counsel because his counsel did not advise him of his speedy trial rights or explain the reason it was in his best interest to waive those rights." (*People v. Scott* (Sept. 6, 2006, D047613) [nonpub. opn.].) Petitioner then made three attempts in the trial court to obtain habeas relief. Having not succeeded in his four attacks on counsel at trial, his three habeas petitions filed in the trial court, and here on appeal, petitioner brings yet another attack on counsel in the instant petition.

We deny petitioner's contentions against trial counsel for the same reason the trial court did: petitioner failed to raise these challenges on appeal, despite the fact that his entire appeal was based on alleged deficiencies of counsel, and an extensive record existed regarding petitioner's complaints against his attorney. The petition is therefore barred as successive, and petitioner has not established an exception to the procedural bar. (*In re Clark* (1993) 5 Cal.4th 750, 765, 767-768; *In re Harris* (1993) 5 Cal.4th 813, 828-829.) Moreover, for those claims addressed by the trial court on the merits, we hereby adopt the reasoning of the trial court on those claims and deny them here for the same reasons.

We deny petitioner's ineffective assistance of appellate counsel claims because they appear to be new claims not presented to the trial court in the first instance. Although petitioner argued two grounds of ineffective assistance of appellate counsel in his May 23, 2007 petition, those two grounds are different from the claims presented here. Thus, even though this court has original jurisdiction over habeas proceedings, we deny the petition for failing to properly present the basis for the claims to the trial court in the first instance. (See *In re Steele* (2004) 32 Cal.4th 682, 692; *In re Hillery* (1962) 202 Cal.App.2d 293, 294.)

The petition is denied.

D05735 In re Love on Habeas Corpus

The petition is denied.

COURT OF APPEAL OF THE STATE OF CALIFORNIA
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DIVISION ONE
January 29, 2008

D050920 In re Christopher C., a Juvenile

The restitution order is affirmed. Huffman, Acting P.J.; We Concur: McDonald, J., O'Rourke, J.

D051940 In re Butler on Habeas Corpus

The petition is denied.

D052039 In re Fkadu on Habeas Corpus

The petition is denied.

D051709 Mahdavi v. Superior Court of San Diego County/Chou

The petition is denied.

D052109 In re Washington on Habeas Corpus

The petition is denied.

D052375 County of San Diego/Superior Court of San Diego County/Bowen

The petition is denied.

D051149 In re A.D. et al., Juveniles

The petition for rehearing is denied. Justices Nares and Haller concur in the denial. Justice McDonald would grant.

D049158 Sloan et al. v. City of San Diego

The judgment is modified to read: "The City of San Diego is required pursuant to San Diego Municipal Code section 24.0103 to include canine care pay in Base Compensation for purposes of calculating retirement benefits. This order applies only to canine care pay earned after July 1, 2000 and earned at a time when canine care pay was identified in an Earnings Codes Document as within the definition of Base Compensation." As so modified, the judgment is affirmed. Appellant to bear respondents' costs on appeal. Haller, Acting P.J. We Concur: Aaron, J., Irion, J.

D051845 Irene C. v. Superior Court of San Diego County/San Diego County Health and Human Services Agency

The petition is denied. The request for stay is denied. Huffman, Acting P.J.; We Concur: McIntyre, J., Aaron, J.

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January 30, 2008

D051178 In re M.M., a Juvenile

The judgment and order are affirmed. McConnell, P.J.; We Concur: Benke, J., Aaron, J.

D050329 People v. Pompa

The judgment of the trial court is affirmed. Aaron, J.; We Concur: Benke, Acting P.J., Haller, J.

D050384 People v. Smith

The judgment is affirmed. McConnell, P.J.; We Concur: McIntyre, J., O'Rourke, J.

D049276 Fourth La Costa Condominium Owners Association v. Seith

The opinion filed January 4, 2008, is ordered certified for publication.

D049862 People v. Twyne

D050986 In re Twyne on Habeas Corpus

(Consolidated) The judgment is affirmed. The petition for writ of habeas corpus is denied. Haller, J.; We Concur: Benke, Acting P.J., Aaron, J.

D052216 In re Ali H., a Juvenile

The notice of appeal is premature because it seeks review of a nonappealable order entered on December 10, 2007. The appeal filed on December 20, 2007, is dismissed. The court notes a second notice of appeal has been filed from the judgment entered on January 23, 2008.

D051172 In re Calvin P., a Juvenile

The request for publication of the opinion is denied.

D052374 Perry Automotive Group, Inc. v. Superior Court of San Diego County/Boyd

The petition for writ of mandate and request for stay have been read and considered by Justices Benke, Nares and McIntyre. The petition is denied.

D051808 In re Johnson on Habeas Corpus

The petition is denied.

D051639 In re Blankenship on Habeas Corpus

The petition is denied.

D052132 Silvers v. Children's Angelcare Aid International

The dismissal order of January 25, 2007, was filed in error. The dismissal order is vacated and the appeal is reinstated.

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January 30, 2008 (Continued)

D051807 In re Smith on Habeas Corpus

The petition for writ of habeas corpus has been read and considered by Justices Benke, Nares and Aaron. We take judicial notice of petitioner's pending direct appeal No. D049993, and prior habeas petition No. D050928. We denied petitioner's prior habeas petition No. D050928 without prejudice pending the outcome of petitioner's direct appeal. Despite our order, petitioner filed the instant petition raising challenges to his sentence similar to the ones presented in the prior petition. Because petitioner's appeal is still pending, we likewise deny the instant petition without prejudice pending the outcome of the appeal. The Clerk of the Court is directed to serve a copy of the petition and this order on appellate counsel for petitioner: Christopher Blake; 4455 Lamont Street, #B; San Diego, California 92109.

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D051490 In re Angelo L. et al., Juveniles

The appeal is dismissed. McIntyre, J.; We Concur: Benke, Acting P.J., Nares, J.

D051358 In re Joshua A. et al., Juveniles

Upon notification that the superior court has reinstated reunification services, and upon written stipulation for dismissal filed by the parties to the appeal, the appeal is DISMISSED as moot and the remittitur is ordered to issue immediately.

D052360 People v. Kinder

The petition is denied.

D049810 People v. Esquera

The judgment is affirmed. McDonald, J.; We Concur: Huffman, Acting P.J., Aaron, J.

D051810 In re Saenz on Habeas Corpus

The petition is denied.

D049695 Matterson et al. v. Baker et al.

Upon written request filed by appellant, the appeal is dismissed and the remittitur is ordered to issue immediately. (Cal. Rules of Court, rule 8.244(c)(2).) Each party to bear own costs on appeal.

D051147 In re S.B. et al., Juveniles

The judgments are affirmed. Aaron, J.; We Concur: Benke, Acting P.J., Huffman, J.

D052404 College Loan Corporation v. Superior Court of San Diego County/Rathbone

The petition for writ of mandate and request for stay have been read and considered by Justices Benke, Nares and Aaron. The petition is denied.

D050080 Sarah B. v. Floyd B.

The order of the trial court is affirmed. CERTIFIED FOR PARTIAL PUBLICATION. Aaron, J.; We Concur: Benke, Acting P.J., Haller, J.

D052238 Reliance Insurance Company v. C & W Diving Services, Inc.

The appeal filed December 17, 2007, is dismissed because appellant did not timely deposit costs for preparing the record on appeal.

D051198 In re Wade M., a Juvenile

The judgment is affirmed. Haller, Acting P.J.; We Concur: McDonald, J., Irion, J.

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE
February 1, 2008

D052262 Leticia L. v. Superior Court of San Diego County/San Diego County Health and Human Services Agency

The attorney for petitioner Leticia L. has notified the court that a petition for writ of mandate under California Rules of Court, rule 8.452 and 5.600 will not be filed as there are no viable issues for writ review. The case is dismissed.

D052210 Alsayad v. Superior Court of San Diego County/People

The petition is denied.

D052379 Alsayad v. Superior Court of San Diego County/People

The petition is denied.

D051809 In re Storm on Habeas Corpus

The petition is denied.

D052446 Olivier B. v. Carla Paola G.F.

The petition for writ of supersedeas, request for stay and response have been read and considered by Justices McIntyre, Aaron and Irion. The petition is denied.